

with the applicant..." Furthermore, Mr. Daly specifically explained that the sites would be used for LPTV. To the extent Mr. Rick or Mr. March had any concerns about the use of their sites, their concerns did not prevent them from signing the letters that granted reasonable assurance. Nothing prevented them from withholding reasonable assurance until they obtained additional information. Under the Commission's standard, the precise size of the structure was one of those "other details" that did not have to be negotiated before the application was filed. Raystay thus had reasonable assurance of site availability when it filed its applications. Mr. Daly believed he had provided reasonable assurance. Attachment 8, P. 3. George Gardner was never informed that the sites were unavailable or unsuitable. Attachment 2, P. 3. Accordingly, Raystay's implicit certification of site availability was correct.

The very most that TBF has shown is that Messrs. Rick and March were under a misapprehension as to the exact size of the facilities Raystay was proposing to build. Such a misapprehension falls far short of demonstrating that Raystay

explained the intended use of the sites (low-power television), and both site representatives provided reasonable assurance letters despite any questions they had.<sup>6</sup> Raystay clearly acted in good faith.

TBF's citation of Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5845-46, 70 RR 2d 9, 13-14 (Rev. Bd. 1991) is inapposite. The Board's basis for specifying a misrepresentation issue in that case is unclear. In any event, the site owner did not give the required reasonable assurance; he specifically told the applicant's principal only "that he would consider the possibility of placing a small antenna on the building..." Messrs. Rick and March, on the other hand, did more than "consider the possibility" - they signed reasonable assurance letters. Moreover, the applicant in Rem Malloy was proposing a 258 foot structure, which was far larger than the structures proposed here and clearly more than the "small antenna" that the owner possibly agreed to.

#### B. The Extension Applications

TBF also attacks certain identical statements made by Raystay in applications filed to extend the Lancaster and Lebanon construction permits. With respect to the Lancaster applications, TBF alleges that Raystay determined it could not use the Lancaster site. TBF Motion, P. 38. With respect to

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<sup>6</sup> TBF's statement that Mr. Rick "refused to sign a letter of intent" (TBF Motion, P. 37) is highly misleading. Mr. Rick prepared and signed a letter of intent, although it was not the letter Mr. Daly originally offered him.

all of the applications, TBF challenges the statements that Raystay had entered into lease negotiations with the site owners and that the sites had been visited to ascertain what work would have to be done at the site. TBF Motion, Pp. 39-40, 42-43. None of TBF's arguments can withstand scrutiny.

The attached declaration of David A. Gardner (Attachment 9 to this opposition) demonstrates that all of the challenged statement were correct. Mr. Gardner explains that in the latter part of 1991, he was involved in negotiations with several parties who were interested in purchasing the Lancaster and Lebanon LPTV construction permits (including Trinity). In the early fall of 1991, one of the potential purchasers asked David Gardner to call the owners to ascertain that the sites were still available. Mr. Gardner called both Ready Mixed Concrete Company and the Quality Inn, who confirmed that they were still willing to negotiate with Raystay. Mr. Gardner "generally discussed possible lease terms with both individuals." Attachment 9, P. 1.

A contract engineer hired by the potential buyer then visited both the Lancaster and Lebanon sites. The engineer was impressed with the Lebanon site, but was concerned about dust at the Lancaster site. Mr. Gardner was not told anything which would have led him to conclude that the site was unsuitable. If anybody told Mr. Rick that the site was unsuitable, it was the engineer for the potential buyer, not Mr. Gardner. Attachment 9, P. 2. Clearly, TBF's claim that

Raystay had determined that the site was unsuitable is based upon the incorrect premise that somebody from Raystay had told Mr. Rick that the site was unsuitable. As Mr. Gardner's declaration establishes, it was not Raystay who formed that opinion.

With respect to the statement that "[Raystay] has entered into lease negotiations with representatives of the antenna site specified in the applications", that statement referred to Mr. Gardner's 1991 phone conversations with the site representatives, where lease terms were generally discussed. Attachment 9, P. 2. The reference to visitations of the sites refers to the engineer's visit to both the Lancaster and Lebanon sites, as well as David Gardner's viewing of the sites. Attachment 9, Pp. 2-3. Mr. Gardner's declaration establishes that the statements were true.

Any conflicts between the declarations of Mr. Gardner and Mr. Rick or Mr. March do not require the specification of issues. In determining whether a substantial and material question of fact exists that requires a hearing, the Commission shall consider the entire record and weigh the petitioners's evidence against the facts offered in rebuttal. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561, 65 RR 2d 538, 541-542 (D.C. Cir. 1988). Here, when the Presiding Judge weighs the entire evidence, David Gardner's account must be credited. It is totally unnecessary to question the honesty of Mr. March or Mr. Rick to reach that result. Mr.

March's recall of events is quite uncertain. He could not remember whether he was called or visited by Mr. Daly in 1989, and he completely forgot that he signed a letter of intent. It is not surprising that he would forget a subsequent conversation with David Gardner<sup>7</sup> or the engineer's visit, especially since no lease was ever consummated. Similarly, Mr. Rick was unclear about whose engineer visited the site in 1991, and his recollection appears to be largely based upon the documents he had in his possession.

When the entire record is considered as a whole, TBF has clearly failed to demonstrate the existence of a substantial and material question of fact as to whether Raystay acted with an intent to deceive the Commission. In this case, the relevant inquiry is whether George Gardner, not anybody else connected with Raystay, acted with an intent to deceive the Commission. TBF was required to show that George Gardner knew or had a strong reason to know that the statements in the extension applications were incorrect when he signed the applications. It has wholly failed to make such a showing.

#### VII. THE REHABILITATION SHOWING

TBF argues that the statements made by George Gardner in his rehabilitation showings "could hardly have been made in good faith" in light of the allegations made by TBF. TBF

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<sup>7</sup> It is possible, of course, that David Gardner spoke with representatives of the site owners other than Mr. March or Mr. Rick. Indeed, Mr. March is careful to state that there were no lease negotiations "[t]o the best of my knowledge." TBF Motion, Attachment 20, P. 4.

Motion, Pp. 44-45. Glendale has showed that TBF's allegations of misrepresentation and reporting violations are utterly baseless, so its request for separate misrepresentation issues with respect to the rehabilitation showings must fail. In any event, this request is totally superfluous because it is based upon the allegations made with respect to other requests. Accordingly, even if TBF's character allegations had any merit - which they do not - these superfluous issue requests would have to be denied.

#### VIII. GLENDALE'S INTENTION TO CONSTRUCT

Finally, TBF requests an issue to determine whether Glendale will construct its proposed station. TBF's argument is both simple and simplistic: Raystay's decision not to build the Lancaster and Lebanon LPTV construction permits necessarily presents a prima facie case that Glendale will not build its full-power station in Miami. TBF Motion, Pp. 45-48. That argument must be summarily rejected as speculative, unsupported by one pertinent case citation, and illogical.

Allegations "based merely on speculation and surmise...do not meet the specificity requirements of §1.229 of the Rules." Folkways Broadcasting Co., Inc., 33 FCC 2d 806, 811, 23 RR 2d 992, 999 (Rev. Bd. 1972). Here, TBF engages in rank speculation that perhaps Raystay did not build the LPTV stations because "Gardner lacked the funds" or "Gardner was simply acquiring construction permits with the intent to build a full-power station."

to sell them..." TBF Motion, P. 47 n.26. TBF is improperly engaging in rank speculation.

Moreover, TBF's rank speculation is wrong. When Raystay filed the Lancaster and Lebanon LPTV applications, Raystay intended to build and to operate those stations. Declaration of George F. Gardner (Attachment 2), P. 3. Raystay intended to form a network of LPTV stations which would have included W40AF, the LPTV station that it has constructed and operated. Mr. Gardner knew that it would have been meaningless for Raystay to apply for construction permits without building the stations because unbuilt construction permits cannot be sold for a profit.<sup>8</sup> Mr. Gardner also confirms that Raystay had the funds available to construct and to operate all of the LPTV stations. Id.

The reason the LPTV stations were not constructed was that Raystay's experience with W40AF eventually convinced Mr. Gardner that the Lancaster and Lebanon LPTV applications would not be financially viable. Attachment 2, P. 3. Raystay has shown its deep commitment to low-power television by continuing to operate W40AF despite heavy losses. The declaration of Lee H. Sandifer (Attachment 10 to this

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<sup>8</sup> Any question as to whether Raystay intended to construct the LPTV stations can only relate to its intentions at the time the initial applications were filed. Once a permittee holds a construction permit, "a permittee has the right to assign its permit..." Jose M. Oti d/b/a Sandino Telecasters, FCC 93-173 (released April 12, 1993) at n.6. The Commission regularly extends construction permits for good cause when a permittee assigns its permit. See, e.g., TV-8, Inc., 2 FCC Rcd 1218, 62 RR 2d 580 (1987).

opposition) and the financial statements attached to his declaration show that Raystay has advanced over \$750,000 to subsidize the operations of W40AF. Clearly, Raystay has gone to tremendous efforts to ensure service to the public on W40AF. Despite its efforts, however, Raystay has never been able to attract a significant over-the-air audience. Attachment 2, P. 3. Thus, Mr. Gardner decided based upon the

examination with W40AF that the operation and program of W40AF

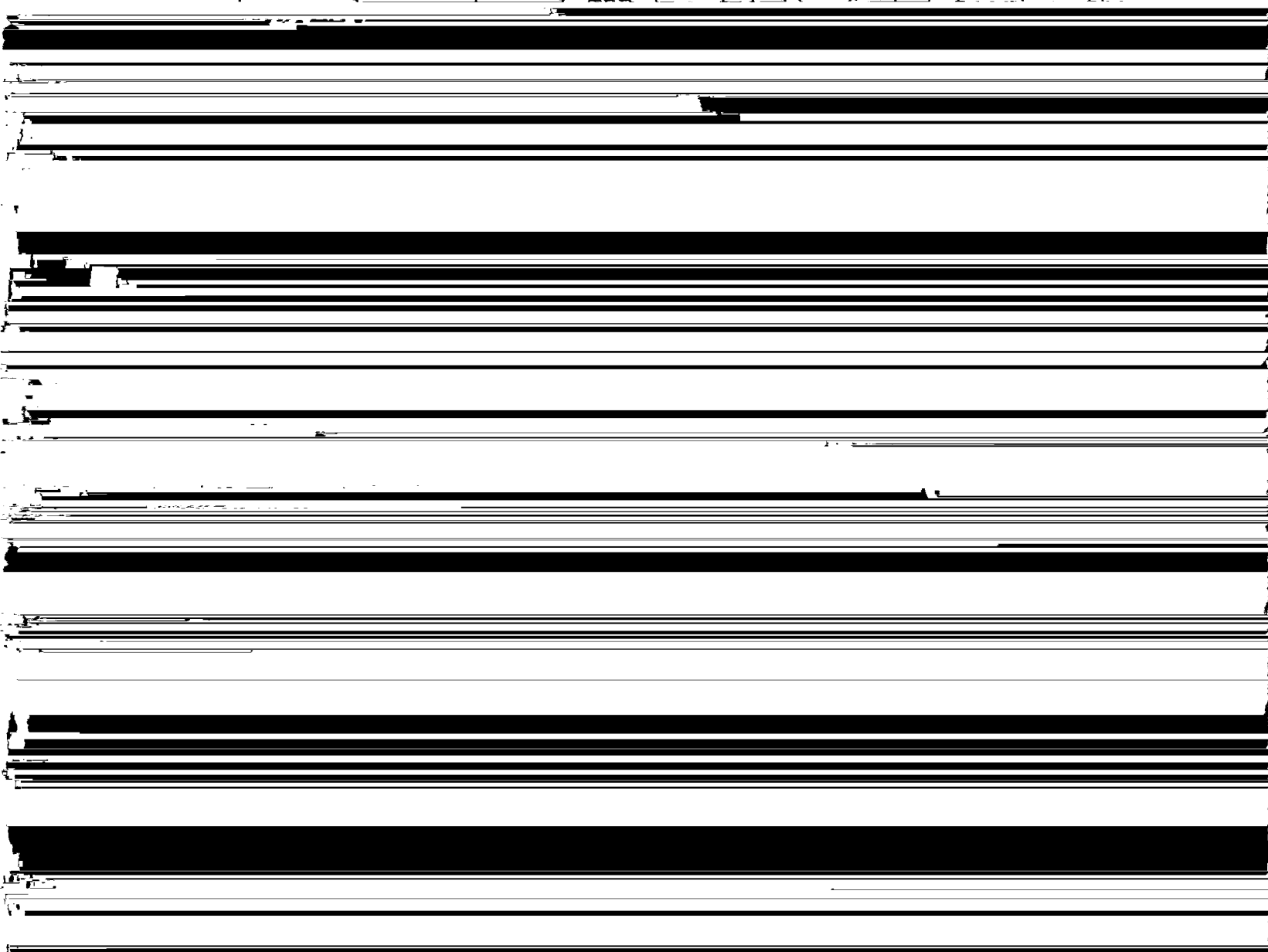
relying upon corporate funds, not Mr. Gardner's personal funds, to construct and to operate the LPTV stations. Id. Therefore, TBF's syllogism that Glendale will not construct its Miami full-power station because Raystay did not construct LPTV stations in Pennsylvania must be rejected as rank speculation.

#### IX. CONCLUSION

In Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1139 n.15, 50 RR 2d 1321, 1326-1327 n.15 (Rev. Bd. 1982), the Board observed:

It is recognized that in comparative licensing proceedings where the applicants' qualifications are frequently fairly close, it is all but irresistible to attempt to stick the competition with a misrepresentation or lack of candor finding as a surefire way to secure the license. It is not surprising, therefore, that our comparative case law is littered with allegations of prevarication to the point where an unfamiliar reader would deduce that our processing files are a collective rap sheet of the nation's pathological liars... Consequently, the citation of FCC v. WOKO, supra, is all but pro forma in the hope that any minor inconsistency may blossom into disqualification of the opponent. While WOKO is endlessly cited for the proposition that even the smallest lack of candor is disqualifying, it is salient that WOKO itself involved a blatant failure to report a 24% change in ownership over a 12 year period. Without backing away from the WOKO dictum, we reiterate firmly that insignificant misstatements do not warrant, in the words of Judge Mikva, the "blunderbuss of disqualification." WADECO. supra. 628

In this case, the Presiding Judge is faced with an incumbent licensee which has been found, on a prima facie basis, to have engaged in a serious and pervasive pattern of misconduct. That licensee has now filed a petition in which it repeats the work "misrepresentation" countless times in an attempt to convince the Presiding Judge that a misrepresentation really exists. A close examination of the facts, however, demonstrates that almost all of the challenged statements were



Accordingly, Glendale asks the Presiding Judge to deny TBF's "Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company".

Respectfully submitted,

GLENDALE BROADCASTING COMPANY

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Its Attorneys

Date: June 7, 1993

RECEIVED

Attachment 1 H-15-6

Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir June 11, 1987).

#### Civil Misrepresentation Issue

12. Allegheny contends that the Commission has recognized that "civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications." *Policy Statement, recon. granted in part*, 6 FCC Rcd 3448 (1991). Here, Allegheny contends, EZ broadcast a civil misrepresentation concerning Randolph to the general public. Consequently, Allegheny contends, an issue is warranted to determine the impact on EZ's character qualifications of the decision of the arbitrator and the adjudication in Case No. GD88-02730.

13. A civil misrepresentation issue will not be specified. In the Commission's *Policy Statement*, the Commission, after recognizing that "*some* civil misrepresentations ... may be relevant to a broadcaster's qualifications," stated that, "[n]evertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications." (emphasis supplied). *Id.* The Commission also stated that it

73.3589 of our rules which restricts payments in exchange for refraining from filing a petition to deny or informal objection.

15. An abuse of process issue will not be specified. Section 73.3589 prohibits "payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection." Here there is no evidence that Randolph threatened to file a petition to deny or informal objection. Nor is there evidence that the payment to Randolph was in exchange for her agreeing not to file a petition to deny or informal objection. Moreover, while Allegheny is correct in its contention that an attempt to improperly influence a person with information would constitute an abuse of process, none of the cases cited by Allegheny support the conclusion that entering into an agreement to settle a civil suit, constitutes such an improper influence. Allegheny's contention that the settlement agreement infringes on its right to obtain the information it needs to successfully challenge EZ's license renewal is also without merit. Allegheny has the right to gather all the information concerning EZ that it can, consistent with the law. This it apparently has done. We fail to see how the settlement agreement has violated any of Al-

faulted the Commission for imposing an unreasonably strict financial qualifications standard on a renewal challenger.

17. We will not dismiss Allegheny's application as technically deficient. Here, Allegheny is seeking the license currently controlled by EZ. Our engineering study shows that the contours of EZ's existing station extend further in the direction of WQIO than do the contours of Allegheny's proposed station. Consequently, a grant of Allegheny's application would not result in an increase in radiation toward WQIO. Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application. See, *Royce International Broadcasting*, 2 FCC Rcd 1368 (1987). Moreover, while the Commission did eliminate the *Cameron* presumption in 1989, that presumption only related to the availability to a challenger of an incumbent licensee's facilities. By eliminating the presumption, however, the Commission did not change the challenger's right to have its application processed under the same standards as the incumbent's. In *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Stations Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5364 (1991), the Commission specifically stated that it would permit existing short-spaced licensees to relocate to another similarly short-spaced site, provided the current overlap is not increased. We agree with Allegheny that, under these circumstances, to preclude the processing of its application pursuant to Section 73.213 would create an impermissible bias in favor of the incumbent licensee. See *Las Vegas Broadcasting Co.*, *supra*. Allegheny's application, however, is short-spaced to the Barnesboro rule-making proposal. Here, Allegheny has requested Section 73.215 processing with regard to the Barnesboro proposal. Allegheny's Section 73.215 showing, however, did not include a request for waiver of the note to subpart (e) of Section 73.215 which states that the Commission will not accept applications that specify short-spaced antenna locations pursuant to this section where the proposed distance separation is less than the normally required distance separations in Section 73.207 by more than 8 km. Consequently, Allegheny is not in compliance with Section 73.215 with regard to the Barnesboro proposal. While Allegheny need not protect the Barnesboro proposal, FCC policy requires that, should that proposal be adopted, Allegheny would have to protect the allotment. Therefore, any subsequent grant of Allegheny's application shall be made contingent on the outcome of MM Docket No. 87-433. See, *Steve P. Neville and Judy Crabtree*, 3 FCC Rcd 148 (Chief, Audio Services Division, 1988).

18. We note, however, that Allegheny is short-spaced to an allotment on Channel 229A at North Madison, Ohio. The *Report and Order*, 7 FCC Rcd 7163 (1992), for this allocation was released on November 5, 1992, and became effective December 21, 1992. Once the allotment became effective, Allegheny was required to eliminate the short-

spacing.<sup>9</sup> Because the Allegheny application was filed before the release of the *Report and Order*, Allegheny will be given thirty days from the release of this Order in which to amend its application to eliminate the conflict with the North Madison, Ohio, allotment.

19. EZ further contends that Allegheny's application should be dismissed because it violates Section 73.316(b)(2) of our rules which prohibits the authorization of directional antennas that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth. Allegheny, however, on August 30, 1991, timely amended, *inter alia*, the engineering portion of its application to modify its directional antenna proposal. EZ, utilizing the relative field tabulations for Allegheny's new proposal, argues that Allegheny's application, as amended, is still in violation of Section 73.316(b)(2) of our rules. Finally, EZ contends, Allegheny failed to state that its antenna will be mounted "in accordance with specific instructions provided by the manufacturer," and that "no other antennas of any type are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation," as required by Sections 73.316(c)(5) and (c)(7) or our rules, respectively. In response, Allegheny contends that the Mass Media Bureau does not require the statements to be explicitly made in construction permit applications and that, in any case, the failure to include the statements would not warrant dismissal of its application.

20. Allegheny's application will not be dismissed for a violation of Section 73.316(b). Based on the relative field tabulations provided in its amendment, Allegheny's application would violate the 2 dB per 10 degree rule. However, this is not the case when compliance with the rule is calculated based on the more accurate ERP data also contained in the amendment.<sup>10</sup> We will, however, require Allegheny to amend its application to provide the statements required by current Sections 73.316(c)(5) and (7) of our rules within thirty (30) days of the release of this Order.<sup>11</sup>

21. EZ further contends that Allegheny failed to notify the Federal Aviation Administration (FAA) of its proposed tower construction even though Allegheny proposes an increase in power over that of the existing WBZZ facility and is within 20 nautical miles of Greater Pittsburgh International Airport. EZ contends that the Allegheny proposal, when combined with that of two other FM stations, would interfere with airport operations. Allegheny is proposing to mount its antenna on an existing tower which was cleared by the FAA (Study No. 76-EA-204-OE). Where applicants are proposing to locate on existing towers, the Commission does not require them to file for further clearance with the FAA.<sup>12</sup> See, Section 17.7 of the Commission's Rules which

<sup>9</sup> We note that both the North Madison petition for rule making and the Allegheny application were filed prior to the effective date of *In re Matter of Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pend.*

<sup>10</sup> A defect will not render an application unacceptable for filing if the needed information can be derived, confidently and reliably, drawing on the application as a whole. See, *Coachella Valley Wireless Corporation*, 7 FCC Rcd 4252 (1992).

<sup>11</sup> FCC Form 301 does not specifically require the submission of these statements. Thus, the failure to supply them does not constitute an acceptability or tenderability defect which would require dismissal of Allegheny's application.

<sup>12</sup> EZ also contends that it does not appear feasible for Allegheny to locate its antenna on its proposed tower because of the location of other antennae on the tower and that, contrary to Allegheny's claim, the tower is neither FAA painted or lighted. Allegheny explains that it was informed by AT&T,

specifies those antenna structures which require FAA notification. In any case, the FAA has registered no objection to Allegheny's proposal.

22. Finally, EZ contends that Allegheny's environmental statement does not establish compliance with the American National Standards Institute (ANSI) guidelines for human exposure to RF radiation because it fails to consider the other radio transmitter facilities co-located at its proposed site. A study by the Mass Media Bureau's engineering staff shows that there are multiple contributors to radio frequency radiation at Allegheny's proposed tower site. Therefore, Allegheny is ordered to submit a certification that

by Cohen and Berfield after determining that the challenger had filed its application solely for the purpose of securing a settlement. In addition, EZ contends that Allegheny's counsel, Lewis Cohen, in investigating EZ, violated Pennsylvania law by knowingly examining and disseminating the record of a civil suit he knew to be under court ordered seal.

25. EZ's allegations do not warrant dismissal or denial of the Allegheny application. The fact that Allegheny's president was involved in two settlements does not establish that the Allegheny application was filed for an improper purpose. In this regard, we note that both settlements were in

(b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted.

27. IT IS FURTHER ORDERED, That any construction permit awarded to Allegheny as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 87-433.

28. IT IS FURTHER ORDERED, That in accordance with paragraph 18 hereinabove, Allegheny shall submit an amendment to its application to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That in accordance with paragraphs 19 and 20 hereinabove, Allegheny shall submit the technical data required by Section 73.316(c)(5) and (c)(7) to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That in accordance with paragraph 22 hereinabove, Allegheny shall submit an amendment with the necessary certification to the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That the Petition to Deny the WBZZ license renewal application filed June 28, 1991, by Allegheny IS DENIED.

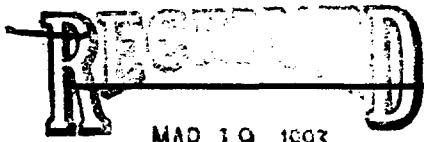
32. IT IS FURTHER ORDERED, That the Petition to Dismiss or Deny filed December 6, 1991, by EZ IS DENIED.

33. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the release of this Order, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issue specified in this Order.

34. IT IS FURTHER ORDERED, That the parties herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief  
Audio Services Division



# Federal Communications Commission

DA 93-226

MAR 19 1993

Before the  
Federal Communications Commission  
Washington, D.C. 20554  
**COHEN & BERFIELD**

MM Docket No. 93-54

In re Applications of

GAF BROADCASTING                      File No. BRH-910201WL  
COMPANY, INC.

For Renewal of License  
of Station WNCN(FM) (104.3 MHz),  
New York, New York

CLASS ENTERTAINMENT                      File No. BPH-910430ME  
AND COMMUNICATIONS, L.P.

THE FIDELIO                              File No. BPH-910502MQ  
GROUP, INC.

For a Construction Permit  
for a New FM Station on  
104.3 MHz at New York, New York

## HEARING DESIGNATION ORDER

Adopted: March 1, 1993;                      Released: March 15, 1993

By Chief, Audio Services Division:

1. The Commission has before it: (a) an application for renewal of license of Station WNCN(FM), New York, New York, filed February 1, 1991, by GAF Broadcasting Com-

<sup>1</sup> There are also pending the following pleadings: (a) Petition for Leave to Amend, filed March 13, 1991, by Class; (b) Comments on Petition for Leave to Amend, filed March 26, 1991, by GAF; (c) Request for Return of Application as Unacceptable for Filing, filed May 30, 1991, by GAF; (d) Opposition to Request for Return of Application as Unacceptable for Filing, filed June 13, 1991, by Fidelio; (e) Reply to Opposition to Request for Return of Application as Unacceptable for Filing, filed June 24, 1991, by GAF; (f) Motion for Leave to File Response, filed June

pany, Inc. ("GAF"); (b) an application for a construction permit for a new FM broadcast station in New York, New York, filed April 30, 1991, by Class Entertainment and Communications, L.P. ("Class"); and (c) an application for a construction permit for a new FM station in New York, New York, filed May 2, 1991, by The Fidelio Group, Inc. ("Fidelio").<sup>1</sup> The applications are mutually exclusive because GAF operates WNCN(FM) on 104.3 MHz, the frequency sought by Class and Fidelio.

## Class Amendment

2. On March 13, 1992, Class filed a Petition for Leave to Amend its application. Class is a limited partnership which originally had three general partners. The amendment reports that one of the general partners, Barbara J. Norris, who initially held a 12.43% ownership interest in Class, has withdrawn from the limited partnership, and her ownership interest has been transferred to one of the two remaining general partners. In comments filed March 26, 1992, GAF urges that acceptance of the Class amendment must be conditioned "to guard against an impermissible comparative upgrade."

3. The Class amendment will be accepted. However, pursuant to longstanding Commission policy, no comparative advantage from this amendment will be allowed. See *V.O.B., Inc.*, 5 FCC Rcd 5872 (Rev. Bd. 1990).

## Request for Return of Fidelio Application

4. On May 30, 1991, GAF petitioned for the return of Fidelio's application as unacceptable for filing. GAF argues that, based on §§ 73.1020(a)(17) and 73.3516(e) of the

York State Conference of Branches of the NAACP ("NAACP"); (s) Consolidated Opposition to Petitions to Deny, filed July 1, 1991, by GAF; (t) Reply to [Consolidated] Opposition to Petition[s] to Deny, filed August 21, 1991, by Guild; (u) Reply to Consolidated Opposition to Petitions to Deny, filed August 21, 1991, by Class; (v) Joint Request for Approval of Settlement Agreement, filed September 14, 1992, by GAF and NAACP; (w) Supplement to Joint Request for Approval of Settlement Agreement, filed September 22, 1992, by GAF; (x) Response of Listen-

....

A back-up filing procedure has been established for only time critical, feeable broadcast . . . applications, previously filed in Washington, to provide "insurance" against loss or late filings.

67 RR 2d at 1127.

11. On reconsideration, the Commission further clarified that the back-up filing procedure is voluntary. See *Fee Collection Program*, 6 FCC Rcd 5919, 5921 (1991).

12. Turning to the instant case, since Fidelio was not required to comply with the back-up filing procedure because the procedure is permissive, Fidelio's decision not to submit an unofficial copy of its application to the Office of the Secretary on May 1, 1991, is a matter without consequence in this case. Therefore, GAF's arguments to the contrary will be rejected.

13. It also is clear that Fidelio's filing was a time critical application. It is irrelevant that the deadline for filing an application mutually exclusive with a renewal application was established by operation of law, rather than by a special filing window or cut-off list. Regardless of how long in advance Fidelio was aware of it, the deadline unquestionably constituted a date certain which, if breached, would have subjected Fidelio's application to dismissal. Because it is concluded that the Fidelio application was a time critical filing, Fidelio was entitled to avail itself of the grace period contemplated in *Fee Collection Program*. Moreover, given the Commission's unambiguous pronouncements that the grace period is an automatic entitlement and that receipt on the next business day after the official deadline "shall constitute" a timely filing, it is further concluded that Fidelio's application was timely filed and received at the Pittsburgh lockbox facility on May 2, 1992.

#### Petition to Deny Fidelio Application

14. On November 19, 1991, GAF petitioned to deny the Fidelio application. GAF contends that the Fidelio application should be rejected because Fidelio has failed to demonstrate that its proposal, if granted, would provide adequate coverage to the community of license. Additionally, GAF argues that the Fidelio application may not be granted without an environmental assessment.<sup>4</sup>

15. Specifically, GAF maintains that because Fidelio's

excess of American National Standards Institute ("ANSI") limits. Accordingly, GAF argues that before Fidelio may effectuate its proposal, protective measures must be taken to limit exposure to excessive RF radiation. However, if Fidelio takes appropriate measures to limit excessive RF radiation exposure, such corrective measures will create severe shadowing problems and impede Fidelio's ability to comply with § 73.315(a) of the Commission's Rules. Section 73.315(a) requires an FM broadcast station to place a minimum field strength of 3.16 mV/m over at least 80% of the residential area of the community of license. See *Naguabo Broadcasting Co.*, 68 RR 2d 1325, 1330 (Rev. Bd. 1991).

16. Fidelio counters that it is highly unlikely that any corrective measures will be necessary to limit RF radiation. However, assuming, *arguendo*, that such measures are required, Fidelio categorically denies GAF's claim that the resulting signal would be so distorted so as to reduce coverage below acceptable levels.

17. We believe that GAF's arguments have merit. Mounting an antenna on the face of a building is relatively unusual. In addition, the interactions between the building and the antenna configuration could have significant adverse effects on the station's radiation pattern and coverage of the community of license. However, it has been Commission policy not to require details of antenna construction or a measured radiation pattern prior to the filing of an application for covering license (e.g., for directional antennas), and we will not do so here. Nevertheless, we will require Fidelio to file an amendment containing a statement from an antenna manufacturer certifying that an omnidirectional antenna can be constructed that will provide omnidirectional service when mounted in the manner and under the circumstances proposed by Fidelio. The statement should, if possible, specify the likely form and size of the antenna. The amendment shall be filed with the Commission within 30 calendar days of the release of this *Order*. In addition, a city-coverage issue shall be specified against Fidelio.

18. GAF also argues in its Petition to Deny that Fidelio should be subject to environmental processing on two independent grounds. Specifically, GAF states that the Chrysler Building upon which Fidelio proposes to sidemount its antenna has been designated an historic landmark in the National Register of Historic Places, and, therefore, Fidelio's proposal may have a significant environmental impact under § 1.1307(a)(4) of the Commission's Rules. In this regard, GAF maintains that Fidelio is

the Chrysler Building are relatively small, "whip-type" private radio antennas that are not visible from street level; Fidelio's proposed antenna would constitute the only broadcast antenna mounted on the Chrysler Building; Fidelio does not propose to construct a supporting tower; the antenna would likely be visible to pedestrians; and the antenna would interfere with the architectural integrity of the Chrysler Building. GAF also argues that the Fidelio application should be subject to environmental processing because it will cause exposure of workers or the general public to levels of RF radiation in excess of ANSI levels.

19. Fidelio responds that although it is far from clear whether formal environmental processing is required, Fidelio's application nonetheless provides sufficient information to effectively constitute an Environmental Assessment. Additionally, Fidelio maintains that given the size of its proposed antenna (several feet wide) and the height at which it will be mounted (nearly the length of three

23. Accordingly, a contingent environmental issue shall be specified below, and Fidelio shall prepare and submit an EA containing the information required in § 1.1311 of the Commission's Rules. The EA shall be directed to the Presiding Administrative Law Judge and filed with the Commission within 30 days of release of this *Order*. In addition, a copy shall be served on the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of § 1.1308. The comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its review of the EA, that Fidelio's proposal will not have a significant impact on the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Administrative Law Judge shall thereafter not consider the environmental effects of the

not allege that GAF acted unreasonably in its selection of those issues. Nor does Guild allege that WNCN(FM) has failed to provide issue responsive programming. Rather, Guild focuses almost exclusively on the quantity and scheduling of WNCN's non-entertainment programming, matters which are within GAF's discretion and, standing alone, do not raise a *prima facie* case for abuse of the licensee's public service programming obligations. See *Deregulation of Radio*, 84 FCC 2d 968 (1981). Accordingly, Guild's petition, to the extent that it seeks denial of the GAF renewal application based on claims of programming deficiencies, will be rejected.

45. IT IS FURTHER ORDERED, That the Petition to Deny [GAF's application], filed May 1, 1991, by Guild IS DENIED TO THE EXTENT INDICATED ABOVE. See "Note" at footnote 1, above.

46. IT IS FURTHER ORDERED, That any grant of GAF's application for renewal of license of Station WNCN(FM) SHALL BE CONDITIONED on final Commission disposition of the staff inquiry into WNCN(FM)'s equal employment opportunity program and practices. See "Note" at footnote 1, above.

47. IT IS FURTHER ORDERED, That FIDELIO SHALL FILE, in accordance with ¶ 23. above, within 30

## Attachment 2

DECLARATION

George F. Gardner, under penalty of perjury, now declares that the following is true and correct to the best of his knowledge:

I am the President of Glendale Broadcasting Company, applicant for a new commercial television station on Channel 45 at Miami, Florida (File No. BPCT-911227KE). I am also President of Raystay Company, which is, the licensee of low-power television station W40AF at Dillsburg, PA.

I was the person who signed the Glendale application. At the time I signed the application, I believed all of the statements in that application were true and correct. I still believe that, as of that time, the statements in the application were true and correct.

When I signed the application, I certified that Glendale had reasonable assurance of site availability. The basis for that certification was a letter dated December 9, 1992, from James Sorensen to Gregory B. Daly, who Glendale had hired to obtain reasonable assurance of a transmitter site. When I signed the Glendale application, I had been informed that Mr. Daly had signed the letter and sent it back to Mr. Sorensen, thus accepting Mr. Sorensen's offer. Until Trinity filed its motions against Glendale, I had no reason to believe that Mr. Sorensen had not received the signed letter or that the TAK Broadcasting site specified by Glendale might not be available. Counsel has informed me that David Harris, the General Manager of TAK Broadcasting's station in Fort Lauderdale, has confirmed that TAK is willing to

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negotiate a lease with Glendale if the Glendale application is granted.

With respect to Glendale's financial qualifications, Glendale is currently relying upon a bank letter from Northern Trust Bank of Florida to finance the construction and operation of its Miami station. Glendale amended its Miami application on March 26, 1992, to reflect that fact. With respect to the Miami application as originally filed, the statements I made in the December 20, 1991 letter to Mary Ann Adams (Exhibit 4 to the application) were true and correct. During the period when Glendale was relying upon my assets to construct and to operate both the Miami and Monroe, Georgia stations, I had sufficient assets to construct and to operate both stations.

Raystay Company is the licensee of low-power television (LPTV) station W40AF at Dillsburg, PA. Until April 8, 1993, it also held construction permits for LPTV stations at Lancaster and Lebanon, PA. Raystay has been deeply committed to the concept of LPTV. It has operated W40AF since 1988, and has worked very hard to make that station successful. Raystay's commitment to LPTV is best demonstrated by the fact that it has spent over \$750,000 earned in other operations to subsidize and to support the operations of W40AF.

The applications for construction permits for the Lancaster and Lebanon LPTV stations (as well as a fifth application for a construction permit for an LPTV station at Red Lion, PA) were filed on March 9, 1989. Those applications were signed by David A.

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Gardner, who at that time was Raystay's Vice President. At the time those applications were filed, it was Raystay's intention to build and to operate those stations. We intended to form a network of LPTV stations (which would include W40AF) that would serve south-central Pennsylvania. I also knew then that an unbuilt construction permit could not be sold for a profit, so it would have been meaningless for Raystay to apply for the stations if the stations were not going to be built. With respect to the transmitter sites specified in the Lebanon and Lancaster applications, I was never informed by anyone that those sites were unavailable to Raystay or that they were unsuitable as LPTV sites.

The reason the Lancaster and Lebanon LPTV stations were never constructed was the fact that W40AF lost a huge sum of money, as reflected in the financial statements provided elsewhere in this opposition. Despite Raystay's diligent efforts, W40AF has never been able to attract a significant over-the-air audience, nor has it been able to obtain carriage on cable television systems other than those owned by Raystay. I eventually made the decision that the Lancaster and Lebanon LPTV stations would not be financially viable. Raystay had discussions with potential buyers of the permits, but the Lancaster and Lebanon permits were never sold. In March of 1993, the decision was made to allow the Lancaster and Lebanon construction permits to be cancelled.

Raystay had sufficient funds available to construct and to operate all of the Lancaster and Lebanon LPTV stations. The funds

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that would have been used to construct these stations would have been Raystay's funds, not my personal funds.

If Glendale's application for a construction permit for a new television station in Miami is granted, I have every intention of constructing and operating that station. The potential audience and earning potential of a full-power television station in Miami are vastly greater than the combined potential audience or earning power for the LPTV stations that were not built. Furthermore, given the substantial amount of funds I anticipate Glendale will have to devote to prosecute Glendale's application, it would be preposterous for Glendale to prosecute its application without intending to build its station inasmuch as Glendale can never profit from a settlement.

June 2, 1993  
Date

George F. Gardner  
George F. Gardner

Attachment 3

LAW OFFICES

COHEN AND BERFIELD, P.C.

BOARD OF TRADE BUILDING

1129 20TH STREET, N.W.

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JOHN J. SCHAUBLE\*

\*VIRGINIA BAR ONLY

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**MAR 26 '92**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
TELECOPIER  
(202) 785-0934

March 26, 1992

Ms. Donna Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, D.C. 20554

Dear Ms. Searcy:

On behalf of Glendale Broadcasting Company, applicant for a new commercial television station on Channel 45 at Miami, Florida (File No. BPCT-911227KE), we are enclosing an original and two copies of an amendment of the application. The amendment is being filed as of right.

Should there be any questions, kindly communicate directly with this office.

Respectfully submitted,

  
Lewis I. Cohen

Enclosures

cc: Colby May, Esq. (w/encl.)

bcc: Henig  
Ara